Supreme Court, U.S.
FILED
FEB 14 2001
OFFICE OF THE CLERK

(4)

No. 00 -948

IN THE
Supreme Court of the United States

UNITED AIRLINES, INC.,
Petitioner,

v.

LESLIE FRANK, *et al.*
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY BRIEF FOR PETITIONER

JENNIFER ANSBRO HALE
United Airlines, Inc.
1200 East Algonquin Road
Elk Grove Village, IL 60007
(847) 700-4194

WALTER E. DELLINGER
(*Counsel of Record*)
TOM A. JERMAN
SRI SRINIVASAN*
JONATHAN D. HACKER
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5300
**Admitted in California*

Attorneys for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONER 1

CONCLUSION 8

TABLE OF AUTHORITIES

Page(s)

CASES

Catlin v. United States,
324 U.S. 229 (1945) 7

EEOC v. American Airlines, Inc.,
48 F.3d 164 (5th Cir. 1995) 4, 5

Hansberry v. Lee,
311 U.S. 32 (1940) 2

Montana v. United States,
440 U.S. 147 (1979) 4, 6

Olmstead v. Zimring,
527 U.S. 581 (1999) 8

Richards v. Jefferson County,
517 U.S. 793 (1996) 2

Seling v. Young,
121 S. Ct. 727 (2001) 8

Texas v. Lesage,
528 U.S. 18 (1999) 8

Ticor Title Ins. Co. v. Brown,
511 U.S. 117 (1994) 2, 3, 6

Wards Cove Packing Co. v. Atonio,
490 U.S. 642 (1989) 8

STATUTES

28 U.S.C. § 1254 7

TABLE OF AUTHORITIES
(continued)

Page(s)

RULES AND REGULATIONS

Fed. R. Civ. P. 23 2

Fed. R. Civ. P. 60 6

OTHER AUTHORITIES

18 Charles Alan Wright et al., *Federal Practice and Procedure* § 4417 (1981) 4

18 James Wm. Moore et al., *Moore's Federal Practice* § 131.40 (3d ed. 1997) 1

Restatement (Second) of Judgments § 26 (1982) 4

Robert L. Stern et al., *Supreme Court Practice* (7th ed. 1993) 8

REPLY BRIEF FOR PETITIONER

The petition presents two questions for this Court's review, both of which implicate a conflict among the federal circuits and the first of which involves an issue that this Court has unsuccessfully attempted to address on three occasions: (1) whether a judgment in a class action lacks binding effect either because the class members did not have an opportunity to opt out of the proceedings or because the facts underlying the judgment have changed in an immaterial way; and (2) whether the Age Discrimination in Employment Act ("ADEA") permits a disparate impact theory of liability. Respondents' two arguments for denying review of the first question are unpersuasive, as one rests on a basic misreading of the decision below and the other skips ahead to the ultimate merits and simply assumes (erroneously) that the decision is correct. Respondents fare no better on the second question, as they cannot – and do not – contest the deep conflict among the circuits on the availability of a disparate impact theory under the ADEA.

1. Respondents, a class of female flight attendants, seek recovery under Title VII in a challenge to the weight program formerly maintained by petitioner United Airlines, Inc., even though a previous action by a class of all present and future female flight attendants also challenging United's weight program under Title VII resulted in a judgment in United's favor – the "*ALPA* judgment." *See* Pet. 2-4. There is no dispute that the class of plaintiffs in the *ALPA* case encompasses the class of plaintiffs in this one.[1] The Ninth Circuit nonetheless refused to find that the *ALPA* judgment pre-

---

[1] It is well established that a judgment in a class action can "bind future claimants, *i.e.*, those persons whose claims have not ripened at the time the judgment is entered but who subsequently come within the defined class." 18 James Wm. Moore et al., *Moore's Federal Practice* § 131.40[3][e][iii] (3d ed. 1997).

cludes this action, reasoning: first, that the class certified under Federal Rule of Civil Procedure 23(b)(2) in *ALPA* did not possess opt out rights and so cannot be precluded from bringing a subsequent class action under Rule 23(b)(3) seeking monetary damages; and second, that the weight policy was nominally revised following the *ALPA* judgment. Both of those justifications, as the petition explains, implicate a conflict among the circuits, and this Court has attempted to resolve the first one on three separate occasions, initially in *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994) (certiorari dismissed as improvidently granted). Respondents present two principal arguments for denying review of the Ninth Circuit's refusal to accord the *ALPA* judgment preclusive effect, neither of which is persuasive.

a. Respondents first contend that the Ninth Circuit found below that the plaintiffs in *ALPA* did not adequately represent the interests of the class in this case, and that the *ALPA* judgment thus cannot preclude this action. *See* Brief in Opposition ("Opp.") 10-11. It is of course well established that due process prohibits class members whose interests were not adequately represented in a prior proceeding from being bound by the judgment. *See Richards v. Jefferson County*, 517 U.S. 793 (1996); *Hansberry v. Lee*, 311 U.S. 32 (1940). Contrary to respondents' assertion, however, the Ninth Circuit simply made no finding of inadequate representation in respect to the *ALPA* judgment. In fact, the central error in the Ninth Circuit's reasoning – as the petition spells out – is precisely that it was *not* based on any conclusion that the class was inadequately represented in connection with the *ALPA* judgment, and turned instead on whether the class members had the right to opt out of the case. *See* Pet. 17-20.

The Ninth Circuit did touch on adequate representation in discussing the *separate* question of whether the *settlement* that followed entry of the *ALPA* judgment – as opposed to the judgment itself – could preclude the current suit. *See* Pet.

App. 11a-12a; Pet. 20-21 n.13. And it is that discussion of the settlement's preclusive effect on which respondents base their contention that the decision below makes a finding of inadequate representation. *See* Opp. 10-11. The preclusive effect of the settlement is not in issue here, however. In respect to the question that *is* in issue here – *viz.*, the preclusive effect of the *judgment* in ALPA – the Ninth Circuit did not purport to address the adequacy of representation. Indeed, respondents did not challenge the adequacy of the *ALPA* representation in the district court or the Ninth Circuit, and United thus has had no opportunity to comment on the subject. This case therefore squarely raises the question whether class members must be afforded an opt out opportunity in order for a judgment in a class action to preclude subsequent claims for monetary damages, *i.e.*, the question that this Court sought to address in *Ticor Title* and two subsequent cases and the question that divides the courts of appeals.[2]

b. Respondents next submit that this case does not present the *Ticor Title* question because the *ALPA* judgment involved a different weight program. *See* Opp. 11-12. But that reasoning simply presumes that the nominal revision to the weight program in 1980 deprives the *ALPA* judgment of any preclusive effect, an issue that is itself encompassed by the first question presented in the petition. *See* Pet. 21-26.

In particular, the Ninth Circuit refused to accord the *ALPA* judgment preclusive effect both because of the lack of opt out rights and because of the slight revision to the weight program. Respondents' argument simply assumes that the second reason is persuasive, and asserts on that basis that the

---

[2] In the course of their discussion of adequate representation, respondents also appear to suggest that the notice provided to the class members in *ALPA* was insufficient to bind the class in this action. *See* Opp. at 9. The Ninth Circuit specifically declined to rest its preclusion ruling on notice considerations, however, focusing instead on the lack of an opt out privilege. *See* Pet. App. 10a-11a.

first reason – *i.e.*, the *Ticor Title* question – thus is not presented for this Court's review. As the petition elaborates, however, the nominal two-pound across-the-board adjustment to the weight program in 1980 should have no material bearing on the *ALPA* judgment's preclusive effect; and the Ninth Circuit's contrary conclusion conflicts with the decision of this Court in *Montana v. United States*, 440 U.S. 147 (1979), and with opinions of other circuit courts, most directly with the Fifth Circuit's decision in *EEOC v. American Airlines, Inc.*, 48 F.3d 164 (5th Cir. 1995). *See* Pet. 21-26.

Respondents note correctly that *Montana* and the other decisions cited in the petition address the subject in terms of issue preclusion rather than claim preclusion. *See* Opp. 14-15. But respondents identify no salient distinction between claim and issue preclusion in the circumstances of this case, and – as the court below explicitly recognized – there is none. To begin with, the tests for determining whether two cases involve the same claim for claim preclusion purposes or the same issue for issue preclusion purposes are similar. *See* Restatement (Second) of Judgments § 26, tit. E, intr. note (1982) ("There is a close relationship between the definition of a 'claim' and the sweep of the rule of issue preclusion."); 18 Charles Alan Wright et al., *Federal Practice and Procedure* § 4417 (1981) (tests articulated by Restatement for "delineating the issue on which litigation is . . . foreclosed by the prior judgment . . . approach very close to the classic tests for defining a cause of action for claim preclusion purposes") (internal quotation marks omitted). And under both claim and issue preclusion, an immaterial change in the controlling facts does not affect a judgment's preclusive effect. *See* Restatement, *supra*, § 24 cmt. f (stating that under claim preclusion, "*[m]aterial* operative facts occurring after the decision with respect to the same subject matter may . . . comprise a transaction which may be made the basis of a second action not precluded by the first") (emphasis added); *Montana*, 440 U.S. at 159 (issue preclusion applies

where no significant change in controlling facts).

More fundamentally, even if the adjustments to United's weight program in 1980 raise a question of issue preclusion rather than claim preclusion, that would be of no significance to whether this Court should grant review. The Ninth Circuit explicitly addressed United's issue preclusion argument and made clear below that its reasons for denying res judicata effect to the *ALPA* judgment apply fully to issue preclusion, *see* Pet. App. 13a, and United raised issue preclusion arguments in the district court, in the Ninth Circuit, and in its petition for certiorari, *see* Pet. 13 n.7.[3] As a result, regardless of whether one conceives of the preclusion question in terms of issue preclusion or claim preclusion, the Ninth Circuit's approach to the question whether the alteration to United's weight program deprives the *ALPA* judgment of binding effect is ripe for this Court's review.

The Ninth Circuit's reasoning on that issue cannot be squared with this Court's decision in *Montana* or with the approach of the other circuit courts. The decision below simply makes no effort to assess whether the two-pound adjustment to the weight program in 1980 amounts to a significant change under *Montana*, instead assuming that the mere fact of the adjustment – no matter how immaterial – automatically defeats preclusion, *see* Pet. App. 9a-10a, notwith-

[3] In the course of responding to United's issue preclusion arguments, the Ninth Circuit suggested that the arguments had been raised only in a footnote in United's brief. *See* Pet. App. 13a. Even if that were relevant, it is simply incorrect. United's brief in the Ninth Circuit clearly argued that issue preclusion principles barred the current action, *see* Br. of Deft.-Appellee United Airlines, Inc., *Frank v. United Airlines, Inc.*, No. 98-15638 (9th Cir. filed Oct. 9, 1998), at 41-42 & n.8, 43-44, citing this Court's decision in *Montana* and the Fifth Circuit's in *EEOC v. American Airlines, Inc.*, and stating unambiguously that even if "the two suits address different *claims*," the "subsequent suit may be barred if the dispositive issue is the same" as is true "[i]n the present case," *id.* at 44 (emphasis in original).

standing that the across-the-board adjustment in fact operated to *favor* the plaintiff class. The Ninth Circuit's approach to the nominal change in United's weight program firmly establishes that court as the jurisdiction of choice for plaintiffs throughout the country who desire a second chance to challenge the legality of policies already upheld by other courts. *See* Pet. 25-26.[4]

In short, *both* of the Ninth Circuit's asserted grounds for denying the *ALPA* judgment preclusive effect in this action – *viz.*, the lack of opt out rights (the *Ticor Title* ground), and the nominal change in the weight program (the *Montana* ground) – are encompassed by the first question presented in the petition, and both grounds merit this Court's review. That is particularly so given the substantial nationwide implications of the Ninth Circuit's preclusion ruling, which the petition elaborates in detail, *see* Pet. 15-17, 25-26, and which respondents do not dispute.

2. Respondents offer no serious argument against review of the second question presented by the petition: whether "disparate impact" claims are cognizable under the ADEA. Respondents do not deny the clear and persistent split in the circuits over that question, nor do they call into question the

---

[4] As Judge O'Scannlain explained in his dissent, the "lockstep increases in maximum permissible weights . . . are no more material to the plaintiffs' cause of action than the possibility that the new policy was printed and circulated on a different color of paper." Pet. App. 25a-26a. Respondents suggest for the first time in their brief in opposition that demographic changes in the labor market between the time of the *ALPA* judgment in 1979 and the time of filing this suit present a further reason for denying the judgment preclusive effect. *See* Opp. 14-15. The Ninth Circuit relied solely on the two-pound adjustments in 1980, however, and respondents offer no support for the suggestion that subsequent demographic changes of the sort they identify can erase a judgment's binding effect. Such considerations seem more appropriately addressed through a collateral action seeking relief from the initial judgment based on changed factual circumstances. *See* Fed. R. Civ. P. 60(b).

importance of the issue for employers and employees nationwide. They raise only two points, both of which are unavailing.

a. First, respondents note that, unlike the policies at issue in the other cases implicated in the circuit split, the challenged program in this case "classifies employees on the basis of age." Opp. at 16. Respondents admit, however, that the way in which the program classifies employees by age is entirely irrelevant to their disparate impact claim. Indeed, the court of appeals affirmed the trial court's dismissal of respondent's disparate *treatment* claim, Pet. App. at 19a, and respondents take no issue with that ruling. To the contrary, respondents themselves insist that the challenged program *is* "facially neutral" with respect to age. Opp. at 16; *see id.* at 17 n.12 (noting "Respondents' allegation that the weight program's allowances for age were facially neutral but had a disparate impact on flight attendants over the age of 40"). The decision below thus squarely presents the ADEA/disparate impact question that has deeply divided the circuits: whether a policy neutral with respect to age nevertheless can be found to violate the ADEA solely because of an alleged disparate impact on older employees.

b. Respondents' only other objection to review of that question rests on the fact that the Ninth Circuit's order reversed the trial court's dismissal of the disparate impact age discrimination claim and remanded the claim for further proceedings. Respondents assert that there is thus no "final order" on the disparate impact claim and that the claim is "not ripe for review by this Court." Opp. at 17. In support of that contention, respondents rely exclusively (and mistakenly) on *Catlin v. United States*, 324 U.S. 229 (1945), a case addressing the appellate jurisdiction of the lower courts. This case, however, involves the certiorari jurisdiction of this Court under 28 U.S.C. § 1254(1), *see* Pet. at 1, which confers "unquestioned jurisdiction" on the Court to review orders of the

kind in issue here, Robert L. Stern et al., *Supreme Court Practice* 195 (7th ed. 1993).

This Court has frequently granted certiorari in such circumstances where there is an "important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari," *id.* at 196 (citing cases); *see, e.g., Seling v. Young*, 121 S. Ct. 727, 730 (2001); *Texas v. Lesage*, 528 U.S. 18, 20 (1999); *Olmstead v. Zimring*, 527 U.S. 581, 595 (1999), including where the issue of law was the standard for evaluating a disparate impact claim, *see Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 649 (1989) (granting certiorari to review standard for evaluating Title VII disparate impact claim despite court of appeals' remand to trial court for application of standard in further proceedings). Here, the disparate-impact claim could not be more fundamental to the further conduct of the case: the only question that remains to be litigated is whether United's policy has a disparate impact on older workers. And the fact that the merits of the ADEA disparate impact claim have not yet been resolved could hardly interfere with this Court's consideration of the question presented, which is whether such claims may be asserted at all. That is a pure question of law, the answer to which will not be made more clear by the expense of further proceedings. There is no reason the Court should not grant the writ now and decide conclusively whether, as a matter of law, the ADEA authorizes the disparate impact claim on which respondents seek to proceed.

CONCLUSION

For the foregoing reasons, as well as the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JENNIFER ANSBRO HALE
United Airlines, Inc.
1200 East Algonquin Road
Elk Grove Village, IL 60007
(847) 700-4194

WALTER E. DELLINGER
(*Counsel of Record*)
TOM A. JERMAN
SRI SRINIVASAN*
JONATHAN D. HACKER
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5300
**Admitted in California*

Dated: February 13, 2001